BOARD OF INQUIRY *(Human Rights Code)*

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Catherine Jeffrey dated July 18, 1995, alleging discrimination in employment and harassment on the basis of handicap and amended to include reprisal.

B E T W E E N :

Ontario Human Rights Commission

- and -

Catherine Jeffrey

Complainant

- and -

Dofasco Inc.

Respondent

INTERIM DECISION

Adjudicator: Matthew D. Garfield

Date: April 30, 2001

Board File No: BI-0183-98

Decision No: 01-008-I

Board of Inquiry (*Human Rights Code*)
505 University Avenue
2nd Floor, Toronto, On M5G 2P3
Phone (416) 314-0004 Fax: (416) 314-8743 Toll free 1-800-668-3946
TTY: (416) 314-2379 / 1-800-424-1168

APPEARANCES

Ontario Human Rights Commission	)	Jennifer Scott and Naomi Overend, Counsel
Catherine Jeffrey, Complainant	)	Fiona Campbell, Counsel
Dofasco Inc., Respondent	)	Michael Hines, Counsel

INTRODUCTION

These are my reasons for decision on a motion brought by the Respondent, Dofasco Inc. ("Dofasco"), for an order dismissing or permanently staying the Complaint of Catherine Jeffrey on the grounds of an abuse of process or, in the alternative, an order striking part of the Statement of Facts and Issues ("Amended Pleading") of the Ontario Human Rights Commission ("Commission").

ISSUES

Regarding the abuse of process motion, has Dofasco met the test for proving an abuse of the Board's process? Are the doctrines of *res judicata* and issue estoppel engaged here? Regarding the motion to strike part of the Amended Pleading, do the parts in dispute fall within the subject-matter of the complaint before the Board and properly belong in a pleading? Should the Commission be allowed to lead similar fact evidence of injured Dofasco workers?

DECISION

The motion to dismiss/stay for abuse of process is dismissed. The motion to strike part of the Amended Pleading is granted in part.

BACKGROUND

This case involves the Complaint of Catherine Jeffrey alleging that Dofasco discriminated against her in the workplace by terminating her employment on March 14, 1994 without first accommodating her disability to the point of undue hardship, contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("*Code*"). Ms Jeffrey filed the Complaint with the Commission on July 18, 1995. The subject-matter of the Complaint was referred to the Board and it commenced the hearing by way of conference call on November 3, 1998.

On January 27, 1999, the Commission filed its Statement of Facts and Issues ("Original Pleading"). In the Original Pleading, the Commission gave notice that it intended to bring a motion to amend the Complaint. In particular, the Commission wanted to add allegations of harassment and reprisal with respect to three incidents involving the withholding of benefits to Ms Jeffrey, surveillance of her, and excessive visits by a Dofasco visitation representative. The Commission also sought to add the ground of reprisal.

The Board heard the motion and on June 15, 2000, the Board rendered its decision ("Interim Decision"). The Board granted the motion and ordered that the Complaint be amended to include the new allegations involving discrimination and harassment and the ground of reprisal. The Commission was ordered to amend its Original Pleading accordingly. It did so, producing the Amended Pleading dated June 28, 2000. Dofasco was also ordered to file its amended Response thereafter, but did not do so because it planned to move to strike part of the Amended Pleading.

ABUSE OF PROCESS MOTION

Parties' Submissions

Dofasco moves for an order dismissing or permanently staying the Complaint before the Board. According to its notice of motion, the grounds are:

> The Complainant has successfully portrayed herself as totally disabled since 1990 in order to obtain over $100,000.00 through a disability pension from Health and Welfare Canada. However, the Commission has pleaded positions which are premised upon the assumption that the Complainant was, and is, capable of working. It is an abuse of process to permit this claim to continue.

Dofasco argues that, by virtue of the Canada Pension Plan ("CPP") disability entitlement determination, the Complainant is estopped from arguing at the Board that she was capable of doing productive work at Dofasco. In other words, she was unemployable and accordingly, it would be an abuse of the Board's process to allow her to argue otherwise here. To allow the

Complainant to argue otherwise, according to Dofasco, "will effectively assist the Complainant in perpetuating a fraud on the Canada Pension Plan."

The Commission argues that Dofasco has not met the test for *res judicata* and issue estoppel: the issues and the parties before the CPP adjudicative structure are not the same as the Board.

The Commission also disputes Dofasco's assertion that Ms Jeffrey claimed for the last ten years to have been virtually unemployable and now argues the opposite before the Board. The Commission writes at para. 16 of its factum:

> The Complainant's disability and its impact on her ability to work were assessed differently at different times by CPP and WCB. From March 1990 to June 1992, the Complainant was deemed "totally disabled" by WCB. In June of 1991, CPP found the Complainant not disabled. In June of 1992, WCB indicated that the Complainant was "partially disabled." In August of 1993, CPP found her to be "disabled." In November of 1993, WCB determined that the Complainant had a 5% "permanent impairment." And, in February 1995, WCB found that the Complainant had a chronic pain disability.

Furthermore, says the Commission, there was never any analysis by Doctors Darracott and Forrest regarding the Complainant's ability to work with accommodation.

The Complainant adopts the submissions of the Commission. In addition, the Complainant submits that Dofasco has not met the high onus for proving abuse of process. The Complainant says that she earned this money over a decade and was "scraping by below the poverty level". This would not shock the system. Furthermore, argues the Complainant, she never claimed that she was totally unemployable. This will come out in the evidence. Accordingly, she submits that it is premature to grant a dismissal at this stage.

Analysis

Section 23(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended ("*SPPA*"), gives a tribunal the power to "prevent abuse of its processes". An abuse of process is something that would shock the public, conduct which would "violate those principles of fundamental justice which underlie the community's sense of fair play and decency" or is vexatious or oppressive in character. *Patel v. Minto Developments (No. 2)*(1996), 26 C.H.R.R. D/444 at D/447-8 (Ont. Bd. Inq.). It will be found only in the most exceptional circumstances. Accordingly, a moving party has a heavy burden to meet this test. Not surprisingly, there have been very few cases dismissed for abuse of process before the Board, and then only in the most egregious of circumstances. *Anonuevo v. General Motors of Canada Ltd.*, [1998] O.H.R.B.I.D. No. 7.

According to Dofasco, what would be shocking to the public amounting to an abuse of process that warrants a dismissal/permanent stay is the fact that the Complainant received a CPP disability pension, asserting that she is unable to perform any productive work, yet then claiming the opposite to suit her purposes in the human rights complaint. Judging from the materials filed, it remains unclear how disabled the Complainant was during the 1990-94 period (and indeed thereafter). The condition of the Complainant and her ability or inability to do productive work at Dofasco during that period will be determined after hearing the *viva voce* evidence at the hearing on the merits. The Board agrees with the Commission's assertion that one must not take an absolutionist approach to the question of disability. The extent of a person's disability is on a continuum – a sliding scale; not an "all or nothing" approach.

Res Judicata and Issue Estoppel

Turning to the doctrines of *res judicata* and issue estoppel, the Board finds that neither is applicable here. The purposes behind the concepts of *res judicata*, cause of action estoppel and issue estoppel are commendable: same actions and issues should not be relitigated; there must be a finality to litigation; and multiplicity of proceedings and inconsistent results should be

avoided. Issue estoppel applies not just to judicial decisions, but to administrative tribunals as well. *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.).

In *Angle v. M.N.R.* (1974), 47 D.L.R. (3d) 544 (S.C.C.), Dickson J. enumerated the three requirements of issue estoppel, relying on English authority:

> Lord Guest in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853 at p. 935, defined the requirements of issue estoppel as:
>
> > "...(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

The Board finds that issue estoppel is not applicable here by virtue of the first and third branches not being met. With respect to the first branch of the test, the issues before the CPP's Director of Appeals and Controls Progams on appeal from the decision of the Disability Adjudicator, are not the same as those before the Board. This is not surprising as the two statutes have different purposes. The *Canada Pension Plan Act* is a federal statute that creates an earnings based insurance program providing, *inter alia*, disability benefits. Its purpose is to provide a degree of protection to the plan's contributor and dependants from loss of income due to retirement, disability and death. The *Code*, on the other hand, is Ontario's paramount statute, and is interpreted by the courts and the Board on a quasi-constitutional basis. The *Code* affirms and protects people's rights to be free from discrimination and harassment based on prohibited grounds.

Applying the principles to the instant case, the CPP regime decided whether the Complainant met the test for qualification for disability benefits based on its enabling legislation. The Board is not bound by the definition of "disabled" in the *Canada Pension Plan Act*. The issues before the Board include:

(1) Was the Complainant disabled and incapable of performing productive work at Dofasco;

(2) If incapable of performing productive work at Dofasco or in essence, unemployable, was Dofasco required to accommodate the Complainant in any event;

(3) If so, did Dofasco accommodate the Complainant to the point of undue hardship;

(4) Did Dofasco violate the Complainant's right to be free from harassment in the workplace;

(5) Did Dofasco commit an act of reprisal against the Complainant; and

(6) If a violation is found, what remedies should issue in respect of the Complainant and the public interest?

Not all of the above issues were relevant to the CPP determination. It is a contributory insurance plan to provide in this case, a quick, summary process to determine if benefits shall issue. The effect of estopping the matter or issues here would be to prevent someone who wants to apply for CPP disability benefits from filing a complaint under Ontario's quasi-constitutional, paramount legislation – the *Code*, or vice-versa. In *Minott v. O'Shanter Development Co.* (1999), 168 D.L.R. (4th) 270, the Ontario Court of Appeal dealt with the question of issue estoppel vis-à-vis an employment insurance benefits determination and a wrongful dismissal proceeding. At para. 55 it wrote:

> As Langdon J. noted in *Hough v. Brunswick Centres* "[t]o become unemployed is a fairly universal experience in modern days. It is an almost automatic reaction for anyone who is terminated or laid off to file for benefits. One does not do so with the thought in mind that if one loses one's claim, one is at risk of having all legal remedies foreclosed."

What Dofasco is asking the Board to do is foreclose the right of the Complainant (and the public as represented by the Commission) to have a determination made regarding alleged violations of the *Code* because the Complainant claimed and received disability benefits under the CPP. To do so would create a chilling result.

The third branch is also not met as the parties here are not the same as the parties before the CPP regime. Under the *Code*, the Commission is charged with the responsibility for the enforcement of the statute and is a party before the Board. Not only is it a party, it has "carriage" of the matter (s. 39(2)(a)). This highlights the public interest component of the *Code*. A proceeding before the Board is not a "private" matter like a labour arbitration or an application for CPP disability benefits.

As the first and third branches of the issue estoppel test have not been established, it is unnecessary to deal with the second branch.

MOTION TO STRIKE

In the alternative, Dofasco moves for an Order:

(1) requiring the Commission to strike those portions of its Amended Pleading which are inconsistent with the asserted total disability of the Complainant from 1990 to date;
(2) striking the phrase "and other Dofasco injured workers associated with an organization called 'SHAFT'" from paragraph 13;
(3) striking all words following the word "Complaint" in paragraph 15;
(4) striking paragraph 16(d) of the Amended Pleading;
(5) striking all words following the word "Complaint" in paragraph 16(e); and
(6) striking reference to Section 12 of the *Code* in paragraph 17.

The Commission agreed to remove paragraph 15 from the Amended Pleading. Accordingly, the Board does not need to address item (3) above.

The Board notes that the Commission did not move to amend its Original Pleading beyond that which was ordered in the Interim Decision or bring a cross-motion to amend in this instant motion. Only paragraph 16(d) of the Amended Pleading was also part of the Commission's Original Pleading.

Disputed Parts of Amended Pleading

The underlined parts of the Amended Pleading listed below are in dispute:

> 13. Dofasco Inc. also arranged for surveillance of Jeffrey, and other Dofasco injured workers associated with an organization called "SHAFT", in 1994-96, both before, and after Jeffrey's termination;

16. (d) There are a number of other injured workers who also claim that Dofasco Inc. treated them in a discriminatory fashion or otherwise unfairly because of their handicap.

16. (e) Dofasco Inc. acted in ways which constituted harassment or reprisal against Jeffrey, because of her handicap, her human rights complaint and her association with other persons who also were injured Dofasco employees, some of which also had human rights or other complaints pending against Dofasco Inc.

17. Therefore, Dofasco Inc. discriminated against its employee Catherine Jeffrey on the ground of handicap, and engaged in harassment and reprisal, contrary to ss. 5, 8, 9 and 12 of the *Human Rights Code.*

Parties' Submissions

Dofasco argues in its factum at p. 19 that the Complaint of Ms Jeffrey is particular to her experiences at Dofasco, including her termination as an employee. It makes no mention of alleged discrimination by Dofasco against any other employee. "It is this specific, individualized Complaint over which the Board of Inquiry now has jurisdiction." Dofasco says the Commission's Amended Pleading must be relevant to the Complaint.

With regards to paragraph 16(d), Dofasco argues it should be struck for lack of relevance to the matter before the Board. It also cites the "overwhelming vagueness" of the allegation and that it was not raised in the Complaint. Furthermore, Dofasco says at p. 20 of its factum:

> ...paragraph 16(d) does not assert any facts which, even if proven, could support a conclusion that the *Code* has been violated by Dofasco. The mere fact that an (unspecified) "number" of other (unidentified) "injured workers" may **claim** to have been improperly treated (as alleged) does not constitute a *Code* violation.

According to Dofasco, other employees' situations are not relevant to a finding of discrimination or remedy vis-à-vis the Complainant. Dofasco points out that this is not a combined hearing – only Catherine Jeffrey's Complaint was referred to the Board. If the Commission is allowed to call witnesses regarding their workplace relationship with Dofasco, Dofasco will call "dozens of witnesses who were accommodated and more disabled than Jeffrey." Dofasco says this an individual complaint, not a systemic one.

Dofasco also claims that the Commission included in its Amended Pleading several allegations not authorized by the Board's Interim Decision, namely:

(a) surveillance of persons other than the Complainant (paragraph 13);
(b) harassment and reprisal due to the Complainant's associations with others (paragraph 16(e)); and
(c) violation of section 12 of the *Code* (paragraph 17).

Dofasco argues that the above proposed amendments should be struck as they were neither requested by the Commission nor granted by the Board.

The Commission argues that allegations of "a pattern of systemic conduct on the part of Dofasco" are relevant here. Accordingly, it is not vexatious or oppressive to plead similar fact evidence. It is often difficult to cleanly separate individual versus systemic discriminatory components of a case. The Commission further submits that the Board's s. 41(1)(a) remedial power is not limited to remedies for the Complainant, but also entails public interest or systemic remedies dealing with "future practices". The pleading of such similar fact evidence is not just relevant to remedy, but to liability as well. The Commission states that it does not wish to call similar fact evidence to establish that other employees were discriminated against by Dofasco

Another argument of the Commission is that it is up to the Board to determine the admissibility and weight of similar fact evidence. The Board cannot do this at this early stage. The Commission says that it intends to call similar fact evidence and will provide particulars in due course. Dofasco should not get to strike the Amended Pleading now and thus limit the Board's inquiry.

Regarding the pleading of section 12 in paragraph 17, the Commission argues that section 12 is an interpretative section. The Commission concedes that no notice was given of its intention to plead section 12 prior to the Commission serving the Amended Pleading nor was it granted permission to do so by the Board.

The Complainant adopts the Commission's submissions. The Complainant stresses that similar fact evidence should not be cut off at this stage. It should be dealt with at the time of the introduction of the evidence at the hearing on the merits.

Entrop v. Imperial Oil Decision

Following the hearing of the motion, the Board requested written submissions from the parties regarding the applicability of the Ontario Court of Appeal's decision in *Entrop v. Imperial Oil* (2000), 50 O.R. (3d) 18. That case was not argued by the parties at the motion. Dofasco and the Commission provided written submissions.

Dofasco says that, "*Entrop* supports its position that the Commission's request to amend the original complaint was improper. It was Dofasco's intention to raise the issue with the Board of Inquiry upon the resumption of any proceedings." Further on, Dofasco writes, "The addition of the harassment and reprisal issues to the Complaint would result in the Board conducting an inquiry into matters not properly before it and cannot be justified under s. 41(1)(a)."

It seems to the Board that Dofasco is attempting to reargue the motion which resulted in the Interim Decision of June 16, 2000. The Board appreciates that *Entrop* was released subsequent to the Interim Decision and that Dofasco has a right to bring motions. However, the Board will be reluctant to revisit issues decided in its Interim Decision, absent a material change in circumstances.

Dofasco submits that *Entrop* directs the Board to look to the "real subject matter" of the complaint to determine the Board's jurisdiction. Dofasco writes, "In this case, what prompted the Complaint is the allegation that Dofasco discriminated against the Complainant on the basis

of handicap." It further argues that, "...there is a strong impetus not to expand the scope of the Board's Inquiry. Unlike Imperial Oil, Dofasco would be significantly prejudiced by any broadening of the scope of the inquiry".

The Commission contends that *Entrop* has no application to Dofasco's motion to strike. It writes:

> The subject matter of the complaint before the Board of Inquiry in this case is whether the complainant, Catherine Jeffrey, was discriminated against in her employment with the respondent Dofasco, on the basis of her disability.

The Commission further argues that *Entrop* does not prevent the Commission from calling similar fact evidence to prove the complaint. It states:

> *Entrop* is about the jurisdiction of the Board of Inquiry to expand the scope of the inquiry beyond the subject matter of the complaint. It is not about the admissibility of similar fact evidence to prove the discrimination set out in the complaint...Indeed, the Court in *Entrop* affirms the authority of the Board of Inquiry to consider a wide range of evidence, so long as this evidence relates to the subject matter of the complaint...Despite the narrow focus of the complaint, the Court found that the Board had the jurisdiction to consider "all aspects" of the alcohol testing policy...The Commission does not intend to expand the subject [sic] the matter of Catherine Jeffrey's complaint...The Commission submits that the Board's statutory remedial powers include the authority to award systemic remedies in an individual complaint.

Analysis

Scope of the Inquiry: "Subject-Matter of the Complaint"

While the Board's section 41 remedial powers are extensive, as the Court of Appeal stated in *Entrop* at para. 57, "The Board cannot work backwards from its remedial powers to enlarge the subject-matter of the complaint. In other words the Board's remedial powers cannot confer jurisdiction over a matter if the Board had no jurisdiction over it at the outset."

The key to determining the "four corners" of the inquiry is, per section 36(1), the "subject-matter of the complaint". What is the crux of the complaint? What events formed the basis of a complainant's decision to file a complaint with the Commission - "the real subject matter" as Laskin J.A. wrote? This reasoning is also buttressed by section 39(1)(a) of the *Code* which reads, "The board of inquiry shall hold a hearing, (a) to determine whether **a right of the complainant** under this Act has been infringed". (my emphasis) It is not a right of non-complainants but "a right of the complainant" which gives jurisdiction to the Board. This includes the right of a complainant to be free from a systemic-based discriminatory environment. "A right" need not be explicitly spelled out in the complaint. But it must have a nexus to, or flow from, the subject-matter of the complaint. It is important to note that the subject-matter of the complaint is not just confined to the actual wording of the complaint form filed with the Commission, but it must relate to the nature of the complaint as filed by a complainant.

How does a systemic case get to the Board if the "subject-matter of the complaint" is tied to the individual complainant? Section 32(3) allows the Commission to refer two or more complaints for a combined hearing at the Board. As well, section 32(2) empowers the Commission to initiate a complaint by itself or at the request of any person. Finally, a systemic case could be argued at the Board where the subject-matter of a single complaint clearly identifies systemic issues. Again, the subject-matter of the complaint is not confined to the actual wording of the complaint form. Ms Jeffrey's complaint filed with the Commission does not contain a systemic component on its face.

Entrop v. Imperial Oil: Court of Appeal's Decision

The Board is mindful of the Ontario Court of Appeal's comments on the "subject-matter of the complaint" in *Entrop*. In that case, the Court of Appeal allowed in part the appeal of a Divisional Court decision denying the appeal of the Board's decision dealing with drug and alcohol testing of employees. The Board had broadened the scope of the hearing to deal not just with Entrop's complaint but with all aspects of alcohol and drug testing under the policy. Laskin J.A., writing for the Court, said the Board lacked the jurisdiction to deal with drug testing provisions of the policy. However, he wrote at para. 45 that "...the Board's decision to inquire

into all aspects of alcohol testing can be justified." The Court also upheld the Board's decision to amend the Complaint to deal with reprisal.

The Board notes in particular the following comments of Laskin J.A.:

> Thus, the board of inquiry's jurisdiction is circumscribed by "the subject matter of the complaint". The subject-matter of Entrop's complaint was the mandatory disclosure of his past alcoholism, his reassignment, and, fairly, the conditions of his reinstatement. (para. 46)
> ...
> Alternatively, under s. 32(2) of the Code, the Commission could have initiated its own complaint alleging that the entire policy was discriminatory, including an allegation that its distribution violated s. 13(1). But the Commission did not do so. (para. 51)
> ...
> Finally, the Board relied on its broad remedial jurisdiction in s. 41(1)(a) of the Code to give it jurisdiction to inquire into the legality of the entire policy. Section 41(1)(a) is indeed a broad remedial provision...But it seems to me the proposition that the Board's broad remedial power can be used to expand its jurisdiction is logically flawed. The Board cannot work backwards from its remedial powers to enlarge the subject-matter of the complaint. In other words the Board's remedial powers cannot confer jurisdiction over a matter if the Board had no jurisdiction over it at the outset. The range of remedies available to the Board, though broad enough to include future practices, must be linked to the subject-matter of the complaint. (para. 57)

Subject-Matter of Catherine Jeffrey's Complaint

What is the "subject-matter of the complaint" of Ms Jeffrey that has been referred to the Board? It is the workplace relationship between the Complainant and Dofasco that culminated in her alleged discriminatory dismissal in 1994, including Dofasco's accommodation (or lack thereof) of Ms Jeffrey. It also includes alleged acts of harassment and reprisal against her by Dofasco.

Ms Jeffrey's complaint is individually based – the focus is on the relationship between Ms Jeffrey and Dofasco. The Board will entertain evidence that bears on the Jeffrey-Dofasco relationship involving the stipulated acts of discrimination based on handicap, harassment and

reprisal. That will no doubt include a description of Dofasco's back to work policies and practices for injured workers that are relevant to this inquiry and their application to Ms Jeffrey. This evidence will be relevant to any determination by the Board regarding liability and remedy, including a section 41(1)(a)"future practices" order.

Findings Regarding Disputed Parts of Amended Pleading

In light of the foregoing, the following is the Board's disposition on the motion with regards to the parts in dispute in the Amended Pleading which are underlined:

> 13. Dofasco Inc. also arranged for surveillance of Jeffrey, and other Dofasco injured workers associated with an organization called "SHAFT", in 1994-96, both before, and after Jeffrey's termination.

This amendment was not authorized by the Board's Interim Decision. The underlined portion is struck. On the merits, such an amendment falls outside the "subject-matter of the complaint".

> 16. (d) There are a number of other injured workers who also claim that Dofasco Inc. treated them in a discriminatory fashion or otherwise unfairly because of their handicap.

This clause formed part of the Original Pleading and remained in the Commission's Amended Pleading. It is struck as it falls outside the "subject-matter of the complaint".

> 16. (e) Dofasco Inc. acted in ways which constituted harassment or reprisal against Jeffrey, because of her handicap, her human rights complaint and her association with other persons who also were injured Dofasco employees, some of which also had human rights or other complaints pending against Dofasco Inc.
>
> 17. Therefore, Dofasco Inc. discriminated against its employee Catherine Jeffrey on

the ground of handicap, and engaged in harassment and reprisal, contrary to ss. 5, 8, 9 and 12 of the *Human Rights Code*.

Regarding the underlined parts in dispute in paragraphs 16(e) and 17 above, the Board strikes them without prejudice to the Commission bringing a motion to amend. This part of the Amended Pleading was never authorized by the Board in its Interim Decision. However, as the proposed amendments appear to relate to Dofasco's treatment of Ms Jeffrey, it may be that such amendments fall within the "subject-matter of the complaint".

Dofasco also moves for an Order "requiring the Commission to strike those portions of its Amended Pleadings which are inconsistent with the asserted total disability of the Complainant from 1990 to date". This claim for relief is not granted. The Board notes that Dofasco has not stipulated what specific portions of the Amended Pleading it wishes to be struck. For the reasons outlined in the abuse of process part of this decision, the Commission is not restricted to pleading "total disability". The evidence on the motion makes it unclear what the true state of the Complainant's disability was. That will be dealt with at the hearing on the merits.

Similar Fact Evidence

The Board has admitted similar fact evidence (also called similar act or similar allegation) going to liability and to remedy, particularly in sexual harassment cases. The Board is not as circumscribed as the civil courts, and certainly the criminal courts, in terms of the admissibility of evidence.

Subsection 15(1) of the *SPPA* provides:

> ...a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court, (a) any oral testimony; and (b) any document or other thing, relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

Subsection 15(2) states:

> Nothing is admissible in evidence at a hearing, (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or (b) that is inadmissible by the statute under which the proceeding arises or any other statute.

The above provisions of the *SPPA* give the Board even more flexibility in admitting "similar fact or act" evidence than a court. Relevancy is the key in terms of the admissibility of evidence before the Board. But it does not stop there. Principles of natural justice dictate that prejudice to a party need also be considered. This balancing occurs in the probative value versus prejudice assessment that occurs by any court or tribunal regarding the admissibility of similar fact evidence.

In J. Sopinka, S.N. Lederman, and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), the authors write:

> The Supreme Court of Canada has held that the "similar fact rule" is an exception to the general exclusionary rule prohibiting the Crown or a party from leading evidence of the bad character of the accused or opposite party...The relevancy of bad character evidence is that the propensity of a person to do an act is relevant to indicate the probability of her or him doing or not doing the act in question. The Supreme Court has held that in *exceptional circumstances*, similar fact evidence is admissible if it is relevant to an issue in the case (other than a relevance that derives from showing only that the accused or opposite party is merely a bad person) *and* its probative value outweighs the prejudice to the accused or opposite party that may arise from the admission of such evidence. (p. 524)(authors' emphasis)
>
> The expression "similar fact rule" or "similar fact evidence rule" is an umbrella term which encompasses a loose category of evidence tending to show a person's discreditable disposition as evidenced by past conduct, possessions or reputation. (p. 525)
>
> Moreover, prejudice, which dominates the determination of admissibility of similar fact evidence in criminal cases, plays a significantly lesser role in civil cases, and evidence of similar facts should be admitted if it is logically probative to an issue in the case as long as, to borrow the formula of Lord Denning, it is not unduly "oppressive or unfair" to the other side, does not consume a disproportionate amount of court time, and does not bear the whole burden of proving the case. (p. 602)

The Board agrees with the propositions advanced in the above quote. The Board will hear from witnesses who have evidence to give which is specific to or, in furtherance of, Ms Jeffrey's complaint. Witnesses may include injured workers so long as their evidence relates to Dofasco's back to work policies for injured workers or to their application to Ms Jeffrey. The Board will examine the relevancy of any proffered similar fact evidence, and engage in a strict analysis of its probative value versus prejudicial effect before the Board will find "exceptional circumstances" exist to admit such evidence. The Board notes that the Commission stated in its written submissions that:

> ....it does not intend to call evidence about the discrimination experienced by other Dofasco employees to found further individual complaints of discrimination nor does it intend to call such evidence to establish a systemic complaint of discrimination.

This also does not mean that the Commission or a complainant can call witnesses aimlessly to show that a respondent must have violated the *Code* against the particular complainant if it did so with x number of other individuals. Rather, in saying that the evidence must be logically probative to a material issue in the case, the evidence must be cogent and have a demonstrable nexus to the issues before the Board and fall within the "subject-matter of the complaint". From an evidentiary context, relevancy is key to the admissibility of evidence, including similar fact. The Board does not want to be in a situation after a long hearing where it writes, "On the evidence presented, I find firstly, that of the twenty witnesses presented by all the parties, more than one-half shed very little light on relevant or disputed matters." *Nelson v. Durham Board of* Education, [1998] O.H.R.B.I.D. No. 14, at para. 14. Accordingly, to avoid this, the Board is going to expect parties at a pre-hearing conference, to present a list of witnesses and summaries of anticipated evidence and show the Board why it should entertain the evidence of said witness(es).

The Canadian Human Rights Tribunal considered the principles of similar fact evidence in *Hewstan v. Auchinleck* (1997), 29 C.H.R.R. D/309. The Board agrees with the following passage at para. 7:

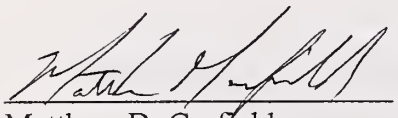
> It would be objectionable for a tribunal to uphold a complaint based on past conduct alone and similar fact evidence must never become a substitute for evidence supporting the allegations themselves... The absence of similar fact evidence should not be fatal to a complaint, nor should the reception of similar fact evidence, without more, be determinative of one.

ORDER

Upon granting Dofasco's motion to strike the Commission's Amended Pleading in part, the Board orders:

1. in paragraph 13, the words "and other Dofasco injured workers associated with an organization called "SHAFT"" be struck;
2. paragraph 16(d) in its entirety be struck;
3. in paragraph 16(e), all the words following the word "complaint" be struck without prejudice to the Commission bringing a motion to amend;
4. in paragraph 17, the part "and 12" be struck without prejudice to the Commission bringing a motion to amend;
5. If the Commission wishes to bring a motion to amend per the two preceding paragraphs of this Order, it shall file its notice of motion within thirty days from the date of this Decision. Dofasco shall file its amended Response and disclose any relevant documents answerable to the Amended Pleading within sixty days from the date of this Decision if the Commission does not bring a motion to amend.

Dated at Toronto, this 30th day of April, 2001.



Matthew D. Garfield
Chair